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No. 83-1166

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL SILVER and DONALD W. PARKER,
Petitioners,

vs.

JOHN C. BENSON, JR., *et al.*,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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COUNTERSTATEMENT OF QUESTION PRESENTED

May elected officials be required to remit misspent public funds to municipal treasuries pursuant to state law permitting surcharge for unauthorized expenditures?

The question stated by Petitioners seeking certiorari has never before been raised in this case. The Petition does not comply with Supreme Court Rule 21.1(h), as it does not, and cannot, set forth any stage in the proceedings where Petitioners' stated federal question was raised.

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Respondent taxpayers John C. Benson, Jr., *et al.* respectfully request that certiorari be denied and the judgment of the Commonwealth Court of Pennsylvania entered in the above matter not be reviewed.

COUNTERSTATEMENT OF OPINIONS BELOW

The "Additional Opinion" filed by the Honorable Edward G. Biester, Jr., of the Court of Common Pleas of Bucks County is improperly reprinted in Petitioners' Appendix, at A(15). It is not part of the record. Its author did not participate in the hearing or decision of

this case and his "Opinion" has no weight or bearing on this proceeding.

The Opinion and Order of the Commonwealth Court of Pennsylvania and of the Court of Common Pleas of Bucks County, Pennsylvania are reprinted in the Appendix to Petitioners' Brief.

LACK OF JURISDICTION

This case presents no Federal question. It was decided under a Pennsylvania statute whose constitutionality has not been subject to attack. Further, Petitioners have no personal stake in determination of the "question" they frame. Petitioners seek an advisory opinion based upon a hypothetical issue. There is, therefore, no case or controversy within Article III jurisdiction. Petitioners' statement of the case does not conform to Supreme Court Rule 21.1(h). The question stated by Petitioners has not been raised before in these proceedings so as to give this Court jurisdiction to review the judgment on Writ of Certiorari. The Petition is therefore subject to denial pursuant to Supreme Court Rule 21.5.

STATUTES INVOLVED

The statutory provisions involved include Section 545 of the Second Class Township Code of the Commonwealth of Pennsylvania, 53 Pa. Stat. Ann. §65545 (Supp. 1983-1984), which provides in pertinent part:

> Any elected or appointed officer, whose act, error or omission has contributed to the financial loss of any township, shall be surcharged by the auditors with the amount of such loss, and the surcharge of any such officer shall take into consideration as its basis, the results of such act, error or omission and the results had the procedure been strictly according to law.

The Second Class Township Code of Pennsylvania, 53 Pa. Stat. Ann. §65610 (Supp. 1983-1984) provides in pertinent part:

> The formation of a State Association of Township Supervisors is hereby authorized . . . The Association shall function under these bylaws for advancing the interest of and betterment of township government in townships of the second class . . . The dues adopted in these bylaws are legal expenditures of the townships and are to be used to pay for the services, publications and other expenses . . . for Association purposes and activities authorized by the Association or incurred in behalf of the Association by its officers and executive committee . . .

The Second Class Township Code of Pennsylvania, 53 Pa. Stat. Ann. §65612 (Supp. 1983-1984) provides in pertinent part:

> "The expenses allowed the delegates attending the annual meeting may be in an amount not exceeding $75 per day for each delegate for not more than four days including the time employed in traveling thereto and therefrom, together with mileage going to and returning from such meeting.

COUNTERSTATEMENT OF THE CASE

Petitioners, Paul Silver (Silver) and Donald W. Parker (Parker) were elected Township Supervisors of Buckingham Township, Bucks County, Pennsylvania. Under Pennsylvania law, Township Supervisors have only those powers delegated to them by the Pennsylvania General Assembly as contained in the Second Class Township Code of the Commonwealth of Pennsylvania, 53 Pa. Stat. Ann. §65101 *et seq.* Further, under Pennsylvania law, if township supervisors make expenditures unauthorized by law, they may be

surcharged pursuant to 53 Pa. Stat. Ann. §65545. In this instance, Parker and Silver as township supervisors spent $35,743.23 of township revenues, paid to a lobbyist in an attempt on their part to influence Pennsylvania legislators to enact legislation designed to reverse the effect of a decision of Pennsylvania's Commonwealth Court. Contending the expenses were improper, certain Buckingham Township taxpayers instituted suit to compel Silver and Parker to reimburse the local treasury for the lobbying expenditure.

This taxpayers' suit was prompted by a report of Buckingham Township Auditors, who found municipal fiscal records in chaos. For example, the township's General Fund checkbook for 1978 had been discontinued from June 1 through December 31, 1978 (R. 19a), with numerous deposits and expenditures not recorded. Ledger receipts fell short of bank statements and many "unaccounted expenditures" for "general government administration" were found. The auditors discovered that money had been transferred between accounts for use in an extraordinary, unbudgeted lobbying campaign, but most expenses were not documented. The auditors isolated $35,743.23 spent by Parker and Silver on lobbying activities. Petitioners' avowed purpose was to obtain legislation to retroactively deny the remedy granted by Pennsylvania Courts to landowners who successfully challenged Buckingham Township's zoning ordinance as being unconstitutionally exclusionary. See *Board of Supervisors of Buckingham Township v. Barness*, 33 Pa. Commonwealth Ct. 364 (1978), *rearg. denied* February 28, 1978, *allocatur denied* July 3, 1978, *cert. denied* 439 U.S. 1116 (1979). Although the Pennsylvania Legislature adopted the legislation, the Legislature was held inapplicable to the *Barness* case, in *Meyers and Robbins, t/a Best Homes v. Board of Supervisors of Lower Makefield Township*, 43 Pa.

Commonwealth Ct. 196 (1979). Petitioners' extraordinary expenditures therefore had no impact on Buckingham Township.

Significantly, at no time in the history of these proceedings have Petitioners challenged the constitutional validity of any Pennsylvania statute. Instead, Parker and Silver raise here for the first time the academic question whether the application of a state statute in effect chills the free exercise of the Municipality's First Amendment rights. Yet the record shows no such chilling.

The Commonwealth Court of Pennsylvania specifically found no abridgement of the First Amendment rights of the individual Petitioners, Silver and Parker. (See Commonwealth Court Opinion, Petitioners' Appendix, A-5.) Petitioners now abandoned that claim and seek to raise for the first time alleged First Amendment rights of the Municipality.

Pennsylvania's Second Class Township Code, 53 P.S. 65610, *et seq.*, authorized formation of the Pennsylvania State Association of Township Supervisors (PSATS), which functions as a lobbying organization "to secure from the General Assembly of Pennsylvania legislation which will enable township government to function more efficiently" (R. 80a). Petitioners argued below that in 1978 PSATS "was unable to engage in extensive lobbying" on behalf of the legislation they supported; they then undertook the lobbying campaign, using local tax revenues already budgeted for other purposes (R. 67a, ¶11). Pennsylvania law, 53 P.S. 65612, allows municipal officials attending PSATS meetings to be reimbursed for expenses up to $75 per day for four days plus mileage. Dues of municipal officials attending PSATS meetings may be paid from public funds under 53 P.S. 65610. Parker and Silver exceeded expenditures allowed from township funds by more than $35,000.

Parker personally testified before the Pennsylvania House of Representatives Local Government Committee (R. 61a. ¶13). His expenses were properly paid from public funds as permitted by state law. Petitioners also attended PSATS meetings. Never has there been any claim of abridgement of speech.

Parker and Silver diverted $35,700 of taxpayers' money budgeted for other purposes, to subsidize their own personal lobbying crusade to change state law. The issue, therefore, is not whether a municipal corporation accountable to the electorate is endowed with First Amendment rights comparable to those of private corporations accountable to shareholders. The issue is whether the public must be compelled to finance Petitioners' lobbying crusade. Parker and Silver now argue in their Brief (page 4, fn. 4) Mr. Parker filed for personal bankruptcy in 1981, yet acknowledge (page 11, fn. 9) available insurance purchased with public funds. The estate of debtor Parker is unaffected by this case. The treasury of Buckingham Township, however, has been depleted and must be reimbursed.

REASONS FOR DENYING THE WRIT

I. The Court Should Not Review This Case Because It Presents No Federal Question Within The "Case Or Controversy" Requirement Of Article III Jurisdiction.

In their zeal to present a federal question, *i.e.* whether municipal corporations are endowed with First Amendment rights comparable to those of private corporations, Petitioners have clearly demonstrated this case is not a proper choice for review. Not only was this question never raised in the five year history of this litigation; it has no direct bearing on the facts of this case, because there has been no abridgement of municipal or official speech.

This is an action for surcharge of municipal officials for fiscally irresponsible, illegal and improper expenditure of $35,743.23 from the Buckingham Township treasury. The expenditure was also outside budgetary procedures mandated by Pennsylvania law. Accountability and fiscal responsibility of elected public officials is the issue here. First Amendment freedoms of the citizenry must not be chilled or limited by government domination of protected speech through use of public funds for lobbying to advance views held by some officials while forcing dissenting taxpayers to finance the opposition.

Supreme Court Rule 17.1 provides that review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The character of reasons considered for certiorari include: (a) when a federal court of appeals has rendered a decision conflicting with another federal appellate court on the same matter; or has decided a federal question so as to conflict with a state court of last resort; or has so far

departed from accepted practice as to call for an exercise of this Court's power of supervision; or (b) when a state court of last resort has decided a federal question in a way conflicting with the decision of another state court of last resort or of a federal court of appeals; or (c) when a state or federal appellate court has decided an important question of federal law which should be settled by this court or has decided a federal question in a way conflicting with applicable decisions of this Court.

None of these reasons for certiorari to review the decision of the Pennsylvania Commonwealth Court exist in this case. Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. *Michigan v. Long*, _____ U.S. _____, 103 S. Ct. 3469 (1983). This principle is based on the jurisdictional concern that this Court should not render an advisory opinion. If the same judgment would be rendered by the state court under state law after this Court corrected its views of federal laws, this Court's review would amount to nothing more than an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459 (1945). This is such a case. Examination of the record demonstrates that all rights were determined upon a state statute whose constitutionality is not in question.

Pennsylvania courts are familiar with the legislative scheme permitting municipal lobbying at minimal public cost through the PSATS and payment of officials' expenses. Pennsylvania has provided a proper and adequate mechanism for making municipalities' views known to the legislature. Statutes cited by Petitioners and opinions of the courts below demonstrate judicial acknowledgment of Pennsylvania's legitimate

governmental interest in assuring fiscal responsibility of municipal officials through mandated budgeting procedures and carefully regulated local spending power. Where a judgment does not depend upon a decision of any federal question, the Supreme Court has no power to disturb it. *Lynch v. New York*, 293 U.S. 52, 55 S.Ct. 16 (1934).

By claiming for the first time that this case presents an undecided issue of First Amendment rights of municipal corporations, Petitioners are masking the real issue of the right of the state to require fiscal responsibility of elected officials. Petitioners have so contorted the issues that it is difficult to recognize Respondent taxpayers' representation of municipal interests in seeking reimbursement of the township treasury. Reduced to its simplest, Parker and Silver contend that unless unbudgeted and unauthorized lobbying expenses are permitted, the first Amendment rights of municipal corporations will be "chilled".

Petitioners lack standing to assert this right for the municipality because they have alleged no abridgement or content regulation of municipal speech, and because they have no personal proprietary interest in the public funds they misused. They lack the requisite "personal stake" in determination of the issue they raise. See generally, *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). That there is no municipal party to this litigation must not be overlooked. To the extent municipal interests are represented here, Respondent taxpayers have proper standing to represent them, by challenging improper spending of local tax funds. *Gilfellan v. City of Philadelphia*, 480 F.Supp. 1161 (E.D.Pa. 1979), *aff.* 637 F.2d 924 (3d Cir., 1980), *cert. denied* 101 S. Ct. 2322 (1981).

By attempting to assert First Amendment rights of municipalities, Parker and Silver have alleged a remote and abstract issue. They ignore the very real danger of governmental domination of protected speech if unfettered spending of public funds were allowed. They allege no state abridgement of speech, no regulation of the content of municipal speech. They challenge no state statute limiting municipal spending power. The question they present is a non-justiciable, generalized issue incapable of adjudication in the context of this litigation. To seek relief in a federal court, a party must demonstrate existence of an "actual controversy" within the meaning of Article III of the United States Constitution. *Steffel v. Thompson*, 415 U.S. 452 (1974). There must be a concrete adverseness between the parties to sharpen presentation of issues and enable the Court to fashion relief. *Baker v. Carr*, 369 U.S. 186 (1962). When the harm complained of is a generalized grievance, it does not warrant the exercise of federal jurisdiction. *Warth v. Seldin, supra.* Parker and Silver cannot achieve standing to litigate municipalities' First Amendment rights by challenging a surcharge properly imposed under a state law whose constitutionality has not been challenged, where there is no record whatsoever of any limiting of municipal or official speech.

II. This Case Should Not Be Reviewed Because The State Court Has Not Decided A Federal Issue In A Way In Conflict With Applicable Decisions Of This Court.

Cammarano v. United States, 358 U.S. 498, 79 S.Ct. 524 (1959) held that Congress is not required by the First Amendment to subsidize lobbying. In *Cammarano*, this Court held Congress did not infringe any First Amendment rights or regulate any First Amendment

activity in enacting treasury regulations providing that money spent by individual or corporate taxpayers for promotion or defeat of legislation is not deductible from gross income. Here, Parker and Silver contend that because they are subject to surcharge, their or the municipality's free speech is chilled. This is not the case. Parker and Silver could, under state law, lobby as much as they might desire. The difference is, however, that the public has the right not to be compelled to pay for their efforts.

In *Regan v. Taxation With Representation*, _____ U.S. _____, 103 S.Ct. 781, 76 L.Ed.2d 129 (1983), this Court held a prohibition against lobbying for tax exempt status was constitutional. In *Regan*, as in *Cammarano*, it was recognized that Congress had simply chosen not to pay for or subsidize lobbying through tax exemptions. This Court again rejected the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the state, citing *Cammarano*, 358 U.S. at 515. The *Regan* court upheld Congressional refusal to pay for lobbying out of public monies, stating, "this Court has never held that Congress must grant a benefit such as TWR (Taxation with Representation) claims here to a person who wishes to exercise a constitutional right." _____ U.S. _____, 76 L.Ed.2d at 137. In unanimously reversing the Court of Appeals of the District of Columbia, the *Regan* court stated, "Congress could, for example, grant funds to an organization dedicated to combatting teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano*, such a statute would be valid." 76 L.Ed.2d 138-139. Legislative power to select particular entities or persons for entitlement to appropriations or tax exemptions is a matter of policy and discretion not open to judicial review, absent extraordinary circumstances which do not exist here.

This Court has held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe upon that right, and thus is not subject to strict scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976), cited in *Regan, supra*. *Buckley* upheld a statute providing federal funds for candidates for public office in primary campaigns but which did not provide funds for candidates who do not run in party primaries. First Amendment and equal protection challenges were rejected by this Court without applying strict scrutiny. The reasoning is simple: Although government may not place obstacles in the path of a person's exercise of freedom of speech, it need not remove obstacles not of its own creation. *Harris v. McRae*, 448 U.S. 297 (1980). Although Parker and Silver might not have had as much money as they wished, without using public funds, and could not have spoken as much as they would have liked, the Constitution does not confer an entitlement to such funds as may be necessary to realize the maximum advantages of their freedom. *Harris, supra*, at 318.

The issue in this case is not whether Parker and Silver, or Buckingham Township for that matter, may lobby. The issue is also not whether the Pennsylvania Legislature is required to provide public money to lobby, beyond limits contained in Pennsylvania's Second Class Township Code. While lobbying is protected by the First Amendment, *Eastern Railroad Presidents v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961), there is no constitutional mandate requiring state legislatures to subsidize municipal lobbying to the point of abuse of local spending power, bypassing mandatory budgetary requirements. The issue is the right of the state to exact fiscal responsibility from its public servants by requiring surcharge for unbudgeted and unauthorized expenditures from the public coffers.

Bell v. New Jersey and Pennsylvania, _____ U.S. _____, 76 L. Ed. 2d 312 (1983), held, after an audit, that New Jersey and Pennsylvania had misapplied federal funds and the United States treasury was entitled to recoup those misspent funds even in the absence of specific statutory direction. This Court held the federal government may recover misused funds.

Pennsylvania's courts have recognized the right of Buckingham Township's treasury to recover misspent public funds. The determination has been made wholly under explicit state law and is completely consistent with the holdings of this Court.

Further, the holding is consistent with action of this Court in *Anderson v. Boston*, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1978), which held a municipality had no authority to appropriate funds to influence the result of a state referendum, and the First Amendment did not prohibit the state's denial to the City of Boston of the power to spend funds to influence a referendum. The state court in *Anderson* acknowledged "Constitutional restrictions on governmental speech even where the subject under discussion is at the heart of First Amendment protection," 380 N.E.2d at 637, and observed that governmental domination of the expression of ideas is repugnant to our system.

The decision below is also in harmony with holdings of the Circuit Courts of Appeal which have addressed municipal lobbying. *Campbell v. Joint District 28-J*, 704 F.2d 501 (10th Cir., 1983), held neither a city nor a joint school district had authority under Colorado law to spend public funds in connection with a referendum proposal to amend the state constitution regarding elector approval of tax measures. *Campbell* held use of public funds to finance opposition to the proposed

constitutional amendment was unauthorized and unlawful, and required reimbursement of those funds to the treasuries from which they were obtained.

Campbell dealt with a state statute, the Campaign Reform Act, which specifically prohibited expenditures by any state agency or political subdivision in election campaigns, but which permitted contributions to campaigns involving only issues in which agencies or municipalities had "an official concern," after specific approval by the governing body. The school district argued the ballot measure involved was an "official concern" because it proposed to limit methods for increasing taxes. Determination of the "official concern" issue turned on whether the question would ever come before the agency for an official decision. A change in the taxing scheme would not cross these local officials' desks for approval; the referendum was therefore not an official concern. They had spent public monies in an area beyond their official responsibility, and were required to remit the misspent funds.

Petitioners' contention that they should not be held accountable for misspent funds because they acted in good faith lacks merit. Good faith or mistaken reliance upon an incorrect legal advisor is no justification for misuse of public money. Nor is an alleged good faith defense an issue meriting constitutional interpretation by this Court.

By using taxpayers' money to subsidize their own personal viewpoints, Parker and Silver abused their offices to deprive Buckingham Township citizens of a fiscally responsible local government. Pennsylvania's Supreme Court, in *Commonwealth ex rel. Specter v. Moak*, 452 Pa. 482 (1973) upheld limitations upon First Amendment rights of public officials and employees in

order to protect the interests of private citizens. *Specter* held state interests in regulating activities of its officials differ significantly from regulation of the citizenry in general, so as to balance the interests of the official in commenting upon matters of public concern with the interest of the state in promoting efficiency of public services.

The budgetary procedure mandated by Pennsylvania law but bypassed by Parker and Silver is structured to allow free public discussion of expenditures, because citizens have a right to know how their tax money is being used. Parker and Silver never told them. They spoke at public meetings (R. 64a, 65a, 95a and 96a), but they never discussed these expenditures. Taxpayers never knew the nature or extent of Petitioners' lobbying campaign expenditures. They hired a lobbyist, paid him a salary, and covered his expenses. None of these types of expenditures are authorized under Pennsylvania law.

This case presents no question of abridged speech for municipal corporations or officials. Petitioners used public money to lobby for passage of a statute to deprive landowners of a judicially authorized remedy under state zoning law. Since such expenditures are not authorized under Pennsylvania law, surcharge is the proper remedy.

CONCLUSION

The Commonwealth Court's holding in this case properly surcharged Petitioners for misspending public money in contravention of Pennsylvania law. There is no federal question presented, for there has been no abridgement or regulation of the content of speech of municipal corporations. Pennsylvania's Legislature is not required to subsidize municipal officials' lobbying in derogation of the substantial state interest in exacting fiscal accountability from elected local officials. This is not a proper case for discretionary review on certiorari.

Respectfully submitted,

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